

# EU Law Scholarship in Crisis: A Quest for Consistent Theory and Workable Doctrine

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2014-04-12T14:15:54

The spectacular events that shook the European Economic and Monetary Union in the past few years have left their footprints in EU law scholarship. The State debt crisis beginning with the announced threat of Greek default in winter 2009/2010 took away Articles 119 to 144 TFEU from the hands of a distinguished group of experts and incited most of EU legal scholars to take part in a vivid discussion. Maybe it is time to consolidate now. Is this achieved by the two Tuoris' book? With respect, the answer is probably no.

The central statement of the book is perfectly clear. The European macro-economic constitution is about stability, which means, in Luhmann's terms, "a structural coupling between economy and law." (p. 57). Crisis has stirred up that economic constitution so much that: "Legal improvisation and innovative constitutional interpretations – if we are allowed a euphemism – were felt a necessity." (p. 120). Price stability is replaced by financial stability (p. 183), the ECB "has compromised on price stability" (p. 186). Structural coupling is de-coupled, therefore the authors end: "In sum, we are not very optimistic." (p. 266).

What is most helpful and interesting to read is the plenitude of arguments against the mainstream – well reflected legal and economic thinking which is by no means "Eurosceptic" or even radical, but legally and also economically/politically sound argumentation. Thus, the authors report the continuous claim that monetary union should have been accompanied by full economic or even political union, but they rightly point out (what is rarely done) that "... the exact meaning and manifestations of the alleged asymmetry tend to remain unclear." (p. 52). Further, they underline – based on a recent [IMF report](#) – the following unpleasant reflection: "Whether a timely Greek default would actually have reduced uncertainty and helped to sort out the crisis quickly or whether it would have led to a catastrophe, such as the crash of the euro, will probably remain an unresolved question, although a recent IMF report would tend to suggest that postponing debt restructuring, led to a worsening of the situation and increased costs of the crisis for Greece in particular." (p. 76). Tuori and Tuori show where the judgment in [Pringle](#) is "vulnerable to criticism" (including AG Kokott's opinion), viz. that it leaves aside the original creditor's position and with it the perspectives of moral hazard and market discipline (p. 126). And last but not least they claim: "Yet, the Treaty is very clear in not allowing the ECB to finance governments ... Hence, mere reference to the permissibility of secondary-market operations under Art. 123 (1) TFEU does not disperse all constitutional misgivings surrounding ECB policy." (pp. 165 *et seq.*; cf. also pp. 49, 51, 103 and 168 on top) Hopefully, the ECJ will consider this when deliberating Case [C-62/14](#) – let alone that

the Tuoris also tend to detect a breach of Art. 125 (1) TFEU here, which even the [Bundesverfassungsgericht](#) does not claim!

But is this the type of monographic analysis we currently need? Problems start with the authors' idea of the "many constitutions of Europe" (p. 4) – the economic, juridical, political, security and social constitution. Is this a normative or a descriptive concept of "constitution"? Apparently, this notion goes back to Kaarlo Tuori's earlier works (and, strangely enough, reminds us about earlier writings of the rather conservative German author [Rupert Scholz about "Teilverfassungen"](#)), and it is of course a deficit of the reviewer that he is neither familiar with that œuvre or with Nordic Critical Legal Positivism in general, so that he feels very uncomfortable in formulating a criticism this harsh. However, it remains unclear when reading the 266 (well written, to be sure!) pages of the book to what extent the particular underlying constitutional theory is helpful in understanding the constitutional shift in the crisis, e.g. the statements listed in the preceding paragraph – many of which the reviewer would accept. The sketch of constitutional relations (p. 7): relations of sedimentation, constitutive relations, relations of justification/criticism/limitation is not visibly taken up in later parts of the book.

Leaving aside this particular approach to constitutional theory, the book includes chapters on the historical development of EMU, on the Pringle judgment, on the shift in economic governance (all the packs, whether six- or two-) and on the interpretation of single articles of the TFEU. Parts of the book are very informative, such as the description of the Werner Plan which foresaw some form of economic government (p. 23) or the explanation of important parts of the Delors report (p. 25). The differentiation between the micro-economic and the macro-economic constitution of the Treaties (pp. 13 *et seq.* i.e. between the single market on the one hand and EMU on the other hand), pointing out that changes in economics mainly affected the latter (cf. the "secular trends": the constant increase of public and private debt in the developed economies, the inclusion of the emerging economies and the decline in volatility, known as the 'Great Moderation', pp. 61 *et seq.*), is particularly creative.

Other passages are unfortunately affected by minor formal mistakes, such as the statement that Article 136 (3) TFEU entered into force on 1 January 2013 (p. 11), which it did only on [1 May 2013](#). The Bundesbank's independence was not enshrined in constitutional law, that is right, but it was not a "myth" (p. 29), but guaranteed by statute ([§ 12 Bundesbankgesetz 1957](#)). The Swedish position on monetary union (p. 47) is different from the British one as Sweden does not benefit from an exception in the Maastricht Treaty (and therefore is in breach of the law for not joining the euro). The fact that the authors chose to put forward their ideas in the shape of an essay rather than an in-depth scholarly analysis – may explain some omissions in the referenced literature (where is [Barry Eichengreen](#) in the sketch of monetary history leading to EMU, where is [Christoph Herrmann, the brave defender of the ECB](#), and also [Jean-Victor Louis](#) and [René Smits](#) do not make an appearance beyond a few references to recent articles). And can we really be satisfied by the – necessary, of course! – disentanglement of "theorists, often lumped together as neo-liberals" from Eucken to Hayek in a brief footnote (no. 41 on p. 42)?

Finally, there are passages where Tuori and Tuori clearly let their political conviction win over consistent argumentation: “In conflicts with the economic constitution, the social constitution has usually been the loser...” (pp. 9, 38), even „the eternal loser“ (pp. 231 *et seq.*). Really? And if so, why? Are some measures of the EU in Greece perhaps unconstitutional? What is the role of institutions such as the [European Committee of Social Rights](#) in the crisis? The Tuoris could easily have quoted their compatriot [Matti Mikkola](#) for a deeper analysis. Of course, conditionality may lead to severe social hardship (p. 134) – but what if the Member States and EU institutions had allowed default to take place in Greece in early 2010? The hardship suffered by Greece now would have been inflicted by Greece’s private creditors claiming back their money or interrupting the flow of fresh loans. Did the EU Member States take up the blame from private creditors in providing support to the States in need?

No doubt the subject is complex, the density of existing analyses is overwhelming. And yet scholarship must strive for more coherence and consistency than political “incrementalism” (p. 266) can ever achieve. While Tuori and Tuori rightfully criticize the incremental reactions to the crisis they do not manage to provide the reader with a comprehensive picture of the relationship between economics and constitutionalism in times of crisis. Of course, it cannot be expected from European legal scholarship that it provides a blueprint of how to proceed after the crisis and to give us a roadmap out of the crisis. Despite their interdisciplinary efforts, legal scholars are not vested with the methodology to do so. But the law has clearly a role in economic governance. What we need is a comprehensive, if not holistic view on the “structural coupling” between law and economy mentioned above. Stability has many facets. We should detect them before becoming too pessimistic as scientists. In this respect further research is needed.

